STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company,	**)**	
AT&T Communications of Illinois, Inc.,	**)**	
TCG Illinois, TCG Chicago, TCG St. Louis,	**)**	
WorldCom, Inc.,	**)**	
McLeodUSA Telecommunications Services, Inc.,	**)**	
XO Illinois, Inc.,	**)**	
NorthPoint Communications, Inc.,	**)**	
Rhythms Netconnection and Rhythms Links, Inc.,	**)**	
Sprint Communications L.P.,	**)**	**No. 01-0120**
Focal Communications Corporation of Illinois,	**)**	
and	**)**	
Gabriel Communications of Illinois Inc.	**)**	
	)	
	)	
Petition for Resolution of Disputed Issues	**)**	
Pursuant to Condition (30) of the SBC/Ameritech	**)**	
Merger Order.	**)**	

SBC ILLINOIS' REPLY BRIEF ON EXCEPTIONS

Illinois Bell Telephone Company ("SBC Illinois") respectfully submits its reply to the exceptions filed by AT&T, MCI, and McLeodUSA (collectively, the "Carriers") and by Staff to the ALJs' Proposed Order on remand from the Illinois Appellate Court's decision in *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 343 Ill. App. 3d 249, 797 N.E.2d 716 (3d Dist. 2003) ("*Illinois Bell*"). As the Proposed Order correctly finds, there is no need to conduct further proceedings in this docket and no basis on which such proceedings could be conducted. The merger condition pursuant to which this docket was established has expired, and the "remedy plan" that was established here (as well the tariff by which that plan was carried out) have been superseded by the Commission's orders in the Alternative Regulation Docket (Nos. 98-0252, 98-0335, and 00-0764) and the Section 271 Docket (No. 01-0662). Moreover, the Proposed Order

correctly refuses to address any potential disputes as to the effect of the expiration of the merger condition on remedies previously paid to CLECs with interconnection agreements, on the grounds that any potential contractual disputes are beyond the scope of this docket and should instead be handled pursuant to the agreements' dispute resolution provisions.

At least on the surface, neither the Staff nor the Carriers take exception to the Proposed Order's substantive recommendations or its reasoning. In fact, both Staff and the Carriers purport to *defend* the principle on which the Proposed Order rests – that the Commission need not and should not decide disputes that do not belong in this docket. That's what makes their exceptions here so difficult to fathom – and ultimately, that is why their exceptions lack merit.

Staff contends that the Proposed Order "incorrectly and imprudently decides issues not presented before the Commission" and would have a "costly and detrimental impact on competitive carriers and the State." Not at all. Separate and apart from the fact that *none* of the allegedly injured competitive carriers have excepted to the Proposed Order's core findings, the Proposed Order could not be more clear that it does *not* decide issues not presented. The Proposed Order states (at 6) that "any determination with regard to overpayments SBC claims to have made are contractual disputes, separate and distinct from the issues at bar" and that "any adjudication regarding what rights SBC has, or what rights it should waive, or whether any recuperation is impermissible" is "outside the scope of this proceeding." In reality, then, it is *Staff* that is asking the Commission to "incorrectly and imprudently decide[] issues not presented before the Commission" by having the Commission undertake proceedings to decide whether to retroactively reinstate the Remedy Plan ordered in this docket, purely for the purpose of deciding "what rights SBC has, or what rights it should waive, or whether any recuperation is impermissible."

The Carriers' exceptions are equally off base. They blithely suggest that the Proposed Order should be "clarified" in some respects due to what they portray as "imprecision" in the Proposed Order's language regarding CLECs who obtained remedies under their interconnection agreements. In reality, however, the Carriers' proposed "clarification" is intended to do what the Proposed Order correctly refuses to do: address the merits of a potential dispute regarding those interconnection agreements. In particular, the Carriers want the Commission to endorse their revisionist theory that *Illinois Bell* (and the Order on Reopening that the Court held unlawful) somehow had no impact on remedies paid under interconnection agreements. The Proposed Order quite clearly and quite correctly refuses to reach the Carriers' contract arguments because they are beyond the scope of the docket and of the Appellate Court's remand. The Carriers' theory is not only antithetical to the Proposed Order's core holding about the scope of this docket (to which the Carriers do not except), but also wrong, because the Order on Reopening specifically did purport to extend the duration of the Remedy Plan for "telecommunications Carriers whose legal right to the remedy plan is based on interconnection agreements . . . in lieu of or in addition to the tariffed remedy plan." The Commission should thus reject the Carriers' "clarification" and uphold the Proposed Order.

BACKGROUND

A recap of the Commission and judicial proceedings on remedy plans is critical to assessing the current state of affairs and understanding why there is nothing left to decide here. SBC Illinois begins with the events that led to this Docket, describes the Commission's actions here and the Court's decision in *Illinois Bell*, discusses subsequent Commission actions in the Alternative Regulation and Section 271 Dockets, and then discusses the Proposed Order.

The 1999 Merger Conditions. SBC Illinois implemented a performance assurance plan as Condition 30 of the Commission's approval of the merger between SBC and Ameritech in

1999. As part of Condition 30, the Commission directed SBC Illinois to participate in collaborative discussions with competing local exchange carriers ("CLECs") regarding "any additions, deletions, or changes to the performance measurements, standards/benchmarks, and remedies that are implemented by SBC/Ameritech in Illinois." Ex. 1 (*Merger Order*) at 264. The Commission stated that "[i]f a dispute over any such addition, deletion, or change cannot be resolved through the collaborative process, any participant may ask the Commission to resolve such dispute." *Id*.

The Commission set a three-year term for that condition in the *Merger Order*. The 1999 *Merger Order* provided that *all* conditions "shall cease to be effective and shall no longer be binding in any respect three years after the Merger Closing Date," unless some different term was "specifically established" in that order. Ex. 1 at 243. During the proceedings that led to the 1999 *Merger Order*, the Commission's Staff, along with AT&T, contended that the remedy plan should have an indefinite term. *Id.* at 218, 221. Nonetheless, Condition 30 did not "specifically establish[]" a termination date other than the general three-year term specified by the *Merger Order* and thus, pursuant to the plain language of the *Merger Order*, it was to expire on October 8, 2002 (three years after the merger closing date).

The Commission's Orders in This Docket. This docket was established to resolve "Disputed Issues Pursuant to Condition (30) of the SBC/Ameritech Merger Order." Pursuant to Condition 30, SBC Illinois participated in collaborative proceedings to discuss proposed changes to the performance measurements, standards, and remedies. The parties reached agreement on performance measures and standards, but were unable to agree on remedies, as the CLECs sought to replace the original Condition 30 remedy plan with an entirely different one of their

own creation. The CLECs and Staff also argued, as they had in the 1999 merger proceedings, that the Condition 30 Remedy Plan should continue beyond October 8, 2002.

In its July 10, 2002 Order in this Docket, the Commission ordered SBC Illinois to make certain modifications to the plan, but reiterated that the plan would expire at the end of the three-year term, that is, on October 8, 2002. As the Commission explained:

> The only conclusion that can be reached is that Condition 30, and consequently the Remedy Plan, expires in three years. . . . [N]o party has given us a legal basis for extending the deadlines included in the *Merger Order*. We are therefore left with the conclusion that the Remedy Plan, as a condition to merger approval, expires in three years from the merger closing date, or October 2002.

After SBC Illinois filed a modified tariff reflecting the October 8 expiration date, the Commission reopened Docket No. 01-0120 and issued an order directing Ameritech Illinois to delete the expiration date. In a footnote, the Commission further stated that the Plan would also be extended for "telecommunications Carriers whose legal right to the remedy plan is based on interconnection agreements . . . in lieu of or in addition to the tariffed remedy plan." SBC Illinois sought judicial review of the Commission's orders, but pending such review it filed a compliance tariff.

The Appellate Court's Decision in *Illinois Bell*. On August 29, 2003, the Appellate Court issued its decision in *Illinois Bell.* The Court held that the Commission "impermissibly expanded [the] duration" of the remedy plan. 343 Ill. App. 3d at 258. As the Court explained, the Order on Reopening erred in stating that there was no "sunset or automatic termination" for the plan, because "when the Commission used the words 'the Remedy Plan * * * expires in three years from the merger closing date,' [in the July 10, 2002 Final Order], it did set a sunset and automatic termination date." *Id*. at 259.

"Moreover," the Court added, "the Commission violated due process by failing to give notice" to SBC Illinois of the Order on Reopening. *Id*. As the Court reasoned, "[n]ot only did

the Commission fail to notify Ameritech of any hearing or proceeding upon which the order on reopening was granted, it also summarily denied Ameritech's application for rehearing." *Id*.

In addition, the Court held that the Commission acted contrary to federal law when it sought to force SBC Illinois to pay remedies by tariff to Carriers who had not even entered into an interconnection agreement, as required by the federal Telecommunications Act of 1996 ("1996 Act" or "Act"). In the Court's words, "the order of the Commission in the case at bar has the . . . effect of bypassing the process set forth in section 252 of the Act" because the Commission purported to "ensure[] that those Carriers that do not have an Interconnection Agreement with Ameritech will have the benefit of the Remedy Plan." *Id*. at 258.

Accordingly, the Court reversed the applicable portions of the Commission's orders and remanded "to enter an order consistent with this opinion and afford petitioner due process." *Id*. at 260. As shown below, the Commission has already conducted further proceedings and terminated the "0120 Plan" that was at issue in *Illinois Bell.*

The Commission's December 30, 2002 Order in the Alternative Regulation Docket. On December 30, 2002, while SBC Illinois' appeal was pending, the Commission entered an order in Docket Nos. 98-0252, 98-0335, and 00-0764 (consolidated), in which it was considering SBC Illinois' plan for Alternative Regulation. Ex. 2. Among other things, the Commission ordered that the performance assurance plan established in Docket No. 01-0120 (the "0120 Plan") be incorporated into the Alternative Regulation Plan. The Commission, however, rejected the proposal of Staff and the CLECs to extend the 0120 Plan indefinitely. Instead, recognizing that wholesale performance issues were also the subject of other proceedings (most notably the Commission's then-pending investigation of compliance with Section 271 of the Telecommunications Act of 1996), the Commission stated that the 0120 Plan would only be

"effective up to and until a wholesale performance measure plan for Section 271 purposes is approved by this Commission." Ex. 2 at 190.[1]

The Commission's Order Terminating The "0120 Plan" And Approving The Section 271 Plan. The Commission's order in the Alternative Regulation referred the remedy plan to the ongoing Section 271 proceeding, Docket No. 01-0662. There, the Commission conducted a comprehensive review of SBC Illinois' wholesale performance for purposes of assessing SBC Illinois' compliance with the "competitive checklist" of Section 271. The Commission also reviewed the results of BearingPoint's independent test of SBC Illinois' operations support systems ("OSS") and Ernst & Young's independent audit of SBC Illinois' commercial performance results. In accordance with the Commission's order in the Alternative Regulation Docket, SBC Illinois proposed a performance assurance plan ("Section 271 Plan"), which was identical to the 0120 Plan in many respects, but also reflected some differences. The Section 271 Plan, as well as the overall record of SBC Illinois' wholesale performance, were subject to five rounds of testimony and comments, as well as briefs on exceptions.

On May 13, 2003, the Commission entered its Final Order in Docket No. 01-0662, in which it found that SBC Illinois had satisfied each element of the 14-point checklist. Ex. 3. After ordering SBC Illinois to make several modifications to the Section 271 Plan, the Commission approved the plan, as modified, stating that the plan "is now the approved Section 271 Plan and will be known and referenced by such terms." Ex. 3 (May 13, 2003 Final Order, Docket No. 01-0662), ¶ 3508. As the Commission explained, further continuation of the 0120 Plan was not warranted (*id.* ¶¶ 3541-3542):

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[1] SBC Illinois has sought judicial review of the Commission's decision to extend the 0120 Plan from December 30, 2002 (the date of the Alt Reg order) to May 2003 (the date that the 0120 Plan was terminated and replaced by the Section 271 Plan). As the Carriers note, that issue is now before the Appellate Court.

> We recognize that the 0120 Plan was designed in, under and for, a different set of circumstances. In that old and much different environment, we are reminded that: (i) comprehensive performance measures and standards had only recently been introduced, (ii) post-merger OSS enhancements (such as the implementation of version 4 of the Local Service Ordering Guide) were still under development, (iii) the third-party OSS test was just getting started. These factors, SBC Illinois contends, all contributed to overall performance being far less good than it is today. Responsibly, the Commission's focus at the time was on spurring improvement.
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> We acknowledge, as indeed we must, that the environment in which we are analyzing SBC Illinois' Compromise Plan is much changed. Today, we observe a more extensive but equally telling set of data. The undisputed evidence shows that since the latter part of year 2000, i.e., the record period for Docket 01-0120, and up to this date, wholesale performance has improved to a significant and sustained level and there are no indications that it will not stay on track. It is well shown that SBC Illinois' performance has improved from 75 to 80% compliance in the fall of year 2000 to 90 and 93% compliance in the fall of year 2002.

The Commission's Order states that the Section 271 Plan will not have a defined termination date; however, the Order provides that a review proceeding will commence within 3 years, in which the Commission will determine whether a performance assurance plan remains necessary and if so, what that plan should be. *Id*. ¶ 3532.[2]

In accordance with the Commission's orders in the Alternative Regulation and Section 271 dockets, SBC Illinois implemented the Section 271 Plan. No party sought judicial review of the Commission's order, and SBC Illinois has paid remedies under the Section 271 Plan for several months.

SBC Illinois then presented to the FCC its application to provide long-distance service in Illinois, which the FCC considered in conjunction with applications for Indiana, Ohio, and Wisconsin. The FCC commended "the outstanding work of the state commissions in

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[2] On January 7, 2004, the Commission entered an order and proposed rule under Part 731 in Docket No. 01-0539 that (among other things) directs SBC Illinois to file a proposed wholesale service quality plan in June 2004. The order states, however, that "there is no reason to believe" that the filing "would result in litigation of the issues addressed in [the section 271] Plan." Jan. 7, 2004 Order, Docket No. 01-0539, at 22.

conjunction with SBC's extensive efforts to open its local exchange markets" which "has resulted in competitive entry in each of these states." Ex. 4 (Oct. 15, 2003 FCC Order), ¶ 2. It specifically "acknowledge[d] the Illinois Commerce Commission" for its "considerable effort and dedication in overseeing SBC's implementation of the requirements of section 271 of the Act" in particular with regard to "implement[ing] performance measures," and developing a performance remedy plan. *Id*. ¶ 3. The FCC then reviewed the Section 271 Plan and concluded that it "provide[s] assurance that local markets will remain open after SBC receives section 271 authorization." *Id*. ¶ 168. Accordingly, it upheld this Commission's conclusion "that the plan, along with other oversight and enforcement authority of the [Illinois Commission] and the FCC, would help ensure that SBC continues to comply with its checklist obligations post-entry." *Id*. ¶ 172.

The Proposed Order on Remand. As noted above, the Appellate Court remanded to the Commission. The Proposed Order correctly recognizes that there is no need to address the existence or content of a going-forward remedy plan, because those issues have already been addressed by the Section 271 Plan. No party excepts to that finding.

Before the ALJs issued the Proposed Order, however, Staff and the Carriers wanted the Commission to address the entirely hypothetical issue of whether *some* remedy plan should have been adopted under some unspecified body of law *other* than the merger approval, for the bygone period between October 8, 2002 (the expiration of Condition 30) and December 30, 2002 (the date of the Commission order that purported to extend the 01-0120 Plan by incorporating it into SBC Illinois' Alternative Regulation Plan). They viewed the hypothetical proceeding as a predicate to addressing a potential dispute between contracting parties – whether SBC Illinois is entitled to recover the money it paid under compulsion of the Commission's order extending the

duration of the Condition 30 remedy plan, now that the Appellate Court has held that the Commission's order "impermissibly expanded" the duration of that plan. *Illinois Bell*, 343 Ill. App. 3d at 258. Alternatively, they demanded that SBC Illinois waive its rights to recover any "remedy" payments that were previously made pursuant to the now-reversed Order on Reopening.

The Proposed Order rejects the position of Staff and the Carriers, holding that "any determination with regard to overpayments SBC claims to have made are contractual disputes, separate and distinct from the issues at bar, as those matters concern specific application of provisions in the Remedy Plan to specific sets of facts." By contrast, the Proposed Order recognizes, "[t]his docket . . . concerns what should be, generally, in a Remedy Plan" and "the contents of the Remedy Plan that arose pursuant to Condition 30 of the Ameritech/SBC merger." Thus, the Proposed Order holds that "any adjudication regarding what rights SBC has, or what rights it should waive, or, whether any recuperation is impermissible retroactive ratemaking," would be "separate and unrelated to this proceeding." "Moreover," the Proposed Order holds, the Carriers' contractual arguments would be beyond the scope of the Appellate Court's remand, as "[t]he Appellate Court's opinion does not remand for further evidence or findings on the specific factual application of the terms of the Remedy Plan." As a result, "if any disputes remain for the period in question, those are also properly resolved through the dispute resolution processes of the agreements in effect during that time period."

DISCUSSION

I. THE PROPOSED ORDER CORRECTLY REJECTS THE ATTEMPTS OF STAFF AND THE CARRIERS TO LITIGATE CONTRACT DISPUTES HERE.

Staff does not take exception to the Proposed Order's reasoning; instead, it virtually ignores the Proposed Order's reasoning, and simply reiterates under new garb its previous

request that the Commission either (a) adjudicate potential contractual disputes between SBC Illinois and the Carriers or (b) force SBC Illinois to waive its rights to recovery of previously-paid amounts under the Remedy Plan.

The Proposed Order correctly rejects Staff's proposals, and the reason is self-evident from the very caption of this docket. This docket is not a "petition for resolution of contract disputes between three Carriers and SBC Illinois." It is not a "petition to establish a retroactive remedy plan under whatever body of law the Carriers can advance to support such a plan." This docket is and remains a petition for resolution of disputed issues under Condition 30. Further, the Proposed Order correctly finds that the Appellate Court did not ask for or contemplate such a proceeding. Finally, the Proposed Order reasons, contractual disputes should first proceed through the contractual process for dispute resolution.

None of these points is disputed, and for that reason alone Staff's proposals should be rejected. Indeed, Staff vociferously argues the very point the Proposed Order makes: that the Commission should avoid adjudication of contractual disputes that are not properly presented here. The first problem is that Staff's "cure" – that the Commission *really should* adjudicate those disputes – is wholly inconsistent with its rationale.

Second, Staff is simply wrong in asserting that the Proposed Order adjudicates contract disputes. To the contrary, the Proposed Order quite clearly refuses to adjudicate such issues and holds them to be "separate" and "wholly unrelated" to this docket. Staff's theory is that the Proposed Order "abandon[ed]" and "essentially voids" the Order on Reopening and thus the Commission's attempt to extend the duration of the Condition 30 Remedy Plan, but that is untrue. It is the Appellate Court that "essentially voided" the Order on Reopening and reinstated the Commission's July 10 Final Order. (Hence, Staff's claim of "due process" is incorrect – the

Commission and the Carriers had ample opportunity to present their arguments to the Appellate Court, and lost.)[3]

The Proposed Order simply recognizes the facts that neither Staff nor the Carriers dispute: (1) the *Appellate Court* determined that the Order on Reopening was unlawful, (2) there is no need to establish a going-forward remedy plan, and (3) any remaining future contract disputes between SBC Illinois and the Carriers with respect to past payments are beyond the scope of this docket.

Third, Staff also errs in its view that the retroactive ratemaking doctrine bars SBC Illinois from reimbursement of remedies paid to the Carriers. The Proposed Order holds Staff's argument to be beyond the scope of this docket, and Staff does not even attempt to dispute the Proposed Order's conclusions. Moreover, the payments here are not "rates": they are not paid by *customers* to SBC Illinois, and they are not payment for services rendered.[4] To the contrary, they are separate payments made *by* SBC Illinois *to* CLECs as a result of shortfalls in meeting specified performance standards. Staff knows the difference full well – after all, Staff and the Carriers successfully argued in this very docket that remedy payments should *not* be credited against payments for services rendered, but paid by a separate check. July 10, 2002 Order, Docket No. 01-0120, at 48.

As is inherent in the very term "remedy plan," such payments are a form of monetary judgment, akin to an award of damages -- and of course, reversal of a damages award (or for that

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[3] Staff is also incorrect in arguing that the Proposed Order's reasoning (that any disputes between SBC Illinois and the Carriers should proceed to the contractual dispute resolution process) somehow represents an adjudication on the merits. Instead, the Proposed Order's holding (the substance of which is not contested by Staff or the Carriers) provides a further basis for its core principle that any such contractual disputes are not to be adjudicated in this docket.

[4] Moreover, SBC Illinois notes that the Carriers – the only CLECs to have filed comments on remand – strenuously insist that the payments they received from SBC Illinois are not "tariffed" either, but are instead contractual.

matter a monetary penalty or other monetary judgment) entitles the paying party to recover the amounts it paid. "It is well established that '[o]n reversal of a judgment under which one of the parties has received benefits, he is under an obligation to make restitution.'" *Buzz Barton & Associates v. Giannone*, 108 Ill. 2d 373, 381-82, 483 N.E.2d 1271, 1275 (1985). "Thus, if a party has received benefits from an erroneous decree or judgment, he must, after reversal, make restitution." *Id*. *See also Restatement of Restitution* § 74 ("A person who has conferred a benefit upon another in compliance with a judgment . . . is entitled to restitution if the judgment is reversed or set aside"). It was not necessary for SBC Illinois to obtain a stay to preserve that right – in fact, courts typically do *not* stay monetary judgments because recovery of amounts paid gives the paying party an adequate remedy at law.

Fourth, Staff also errs in suggesting that the contractual issues between SBC Illinois and the Carriers represent a "live" dispute. To be sure, SBC Illinois has approached the Carriers about recovery of such payments – understandably so, because the only reason SBC Illinois made those payments in the first place was to comply with the Commission's October 1, 2002 Order on Reopening, and that order has been held unlawful. But as the Proposed Order correctly recognizes, SBC Illinois does not seek to have the *Commission* award relief against the Carriers now, or in this proceeding, because such issues are beyond the scope of the proceeding. Rather, it is SBC Illinois' intent to pursue an amicable resolution, and to invoke the Commission's aid only if efforts at "dispute resolution" under its agreements do not bear fruit – and only in the appropriate forum for such disputes, such as a complaint case under an interconnection agreement. Thus, as the Proposed Order recognizes, such issues are not to be adjudicated here but must first proceed through the contractual process for dispute resolution.

Finally, Staff is wrong in suggesting that the Commission should open a proceeding to address a potential future claim against the State for "Tier 2" payments made pursuant to the Order on Reopening. There is no record evidence to support Staff's assertion that SBC Illinois has made a "demand" for repayment from the State, nor is there any suggestion that there is presently a justiciable controversy. More importantly, Staff does not even attempt to argue that such a dispute would be properly adjudicated by the Commission at all, much less in this Condition 30 docket.

The Commission should accordingly reject the following Staff Exceptions:

- Exception 1 (which seeks to rewrite the procedural history to endorse Staff's position on the merits);
- Exception 2 (which seeks to institute proceedings to reinstate the Order on Reopening, purely for use in potential future contractual disputes, and which purports to endorse Staff's view that SBC Illinois' rights to recovery are barred by the retroactive ratemaking doctrine);
- Exception 3 (which tries to rewrite the discussion of the *Illinois Bell* decision to accord with Staff's theories);
- Exception 4 (which seeks to rewrite parts of the Proposed Order's core holding and reasoning that potential contractual disputes are not properly before the Commission);
- Exception 5 (which seeks to edit the Proposed Order's discussion of Staff's position to support Staff on the merits);
- Exception 6 (which argues that the Proposed Order adjudicates potential contractual disputes on the merits, where the Proposed Order does exactly the opposite);

- Exceptions 7 and 8 (which again attempt to rewrite the Proposed Order's discussion to adopt Staff's erroneous views on the merits).

II. THE COMMISSION SHOULD REJECT THE CARRIERS' PROPOSED "CLARIFICATION."

Like Staff, the Carriers do not take exception to the Proposed Order's core holdings or reasoning. Nevertheless, as they did before the Proposed Order, they seek to have the Commission issue advisory opinions on their agreements *now*, in the abstract. This time, the Carriers seek to disguise their request as a "clarification" of the Proposed Order, under which the Commission would say that the *Illinois Bell* decision does not affect remedies paid under their interconnection agreements. The Carriers' arguments are well out of bounds. The purpose of this docket is to resolve disputed issues under the merger conditions, not to resolve disputes between SBC Illinois and individual contracting Carriers (much less to make sweeping advisory statements that the Carriers want to clip and save for later use in such disputes).

The Carriers' proposed "clarification" is also flat wrong. Their view is that the Order on Reopening (which was vacated by *Illinois Bell*) was only about tariffs and really had nothing to do with their interconnection agreements. That theory is belied by the Carriers own conduct: if the Commission's Order on Reopening really were irrelevant to their interconnection agreements or to the remedies paid under those agreements, the Carriers would not have opposed SBC Illinois' petition for rehearing (and its ultimately successful appeal) of that Order, as they so vigorously did. Further, their revisionist position is contrary to the plain language of the Order on Reopening, which *did* purport to affect remedies paid to "telecommunications Carriers whose legal right to the remedy plan is based on interconnection agreements . . . in lieu of or in addition to the tariffed remedy plan."

Finally, the Carriers' argument is contrary to the plain language of their Agreements. Those Agreements merely say that the parties will obey the Commission's orders on remedy plans. The Agreements are not by any means an independent or voluntary agreement to adopt or extend the life of the 01-0120 Plan – to the contrary, they specifically acknowledge that "compliance with and implementation of any such [Commission] order shall *not* represent a voluntary or negotiated agreement under Section 252 of the Act or otherwise, and does *not* in any way constitute a waiver by such party of its position with respect to such order, or of any rights and remedies it may have to seek review of such order or otherwise contest the applicability of the performance measures and remedy plan." Attachment to Carriers' Comments on Remand at 8, 21, 30-31. SBC Illinois *did* contest the applicability of the 01-0120 remedy plan and it prevailed in the Appellate Court. Moreover, the Commission subsequently ended the "applicability" of the 01-0120 Plan when it adopted the Section 271 Plan. The 01-0120 plan no longer exists on the Commission's books, so it no longer exists in the interconnection agreements. In fact, the McLeod Agreement expressly spells out that the parties are to abide by the 0120 order "[u]ntil the earlier of the expiration or termination of this Agreement *or the expiration or termination of the requirements in the 0120 Final Order pursuant to said order or to the decision on any appeal therefrom."* Attachment to Carriers' Comments on Remand at 8.

III. THE COMMISSION SHOULD REJECT THE PROPOSED DICTUM REGARDING THE ALTERNATIVE REGULATION ORDER, WHICH IS NOW BEFORE THE APPELLATE COURT.

Equally improper are the proposals by Staff (Exception 9) and the Carriers to insert dictum regarding the Commission's order in the Alternative Regulation docket and its legal impact. As both Staff and the Carriers recognize, that order is now before the Appellate Court, and its legal effect should not be addressed until the threshold question – whether it is a lawful

order in the first place – is decided. Plainly, that question is no longer before the Commission at all but before the Appellate Court; moreover, it would be beyond the scope of this docket and beyond the scope of the Appellate Court's remand. Indeed, it would be improper for the Commission to respond to the Appellate Court's remand by issuing pronouncements about another decision that may itself be remanded in the near future.

CONCLUSION

For all the reasons set forth above, SBC Illinois requests that the Commission adopt the Proposed Order and deny the exceptions of the Carriers and Staff.

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